SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-436

WALTER V. MEDENICA, a/k/a VOJESLAV MEDENICA,
Petitioner

v.

HOWARD H. CALLAWAY, Secretary of the United States Army,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Walter V. Medenica, a/k/a Vojeslav Medenica, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 27, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of dismissal rendered by the United States District Court for the Northern District of Alabama, is set out in the appendix, *infra,* at p. 1a and reported at —F.2d—.

The judgment of dismissal and the opinion of the United States District Court for the Northern District of Alabama is set out in the appendix, *infra,* at pp. 2a-6a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 27, 1974. This Court has jurisdiction pursuant to 28 U.S. Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether petitioner can be denied prior enlistment status because the government is unable to identify his record of service with the U.S. Army Air Corps pursuant to Section 3254(1) of Title 10 of the U.S. Code notwithstanding the fact that he has adduced unrefuted evidence proving his status, absent a discharge.

FEDERAL STATUTORY PROVISIONS INVOLVED

Section 3254(1) of Title 10, U.S. Code:

> (1) Temporary enlistment in the Army entered into in time of war or of emergency declared by Congress shall be for the duration of the war or emergency plus six months.

STATEMENT OF THE CASE

Petitioner became a naturalized citizen of the United States during July of 1957. He resided in Nice, France as a Yugoslavian refugee immediately after World War II, and during June of 1945 he volunteered to join the United States Army Air Force 81st Airdrome Squadron which was stationed in Nice. He was accepted as an enlistee, issued GI uniforms, resided in the service barracks, was treated as and performed

the duties of an enlistee until February, March or April of 1946, when his Squadron terminated operations in Europe. He was at all times subject to military rules and treated by military personnel as an enlistee.

Prior to his alleged enlistment, petitioner had completed two years of formal college education and considered it his moral obligation to pay his debt to the American Armed Forces for liberating Europe. He at all times wore the standard uniform issued to all U.S. Army Air Force soldiers during his tenure with the 81st Airdrome Squadron and attached originals of photographs taken of him in uniform during his tenure in Nice as Exhibits "1"-"5" to Enclosure "1" of Exhibit "A" to his original complaint filed in the District Court on December 6, 1973. Petitioner's tenure with the U.S. Army Air Force ended during February, March or April of 1946, when the 81st Airdrome Squadron terminated operations in Nice, and he remained in Europe where he completed his formal college education in West Germany with a masters degree in civil engineering prior to immigrating to the United States in 1952.

In 1959 petitioner accepted a position as an engineer with the Army Ballistic Missile Agency of the United States Army at Redstone Arsenal in Huntsville, Alabama (subsequently reorganized in 1960 as Marshall Space Flight Center of the National Aeronautics and Space Administration). He petitioned the Department of the Air Force for veteran status during July of 1970 and its response thereto states that the responsibility for adjudicating claims for veteran preference has been delegated to employing agencies by the Civil Service Commission. He petitioned the

National Aeronautics and Space Administration for veteran preference status during January of 1971 and its response thereto advised him that the agency is unable to award veteran preference because he failed to submit official documentation proving active duty or separation from the uniformed services. Immediately thereafter he appealed NASA's response to the Board of Appeals and Review of the U.S. Civil Service Commission and its response thereto affirms the agency. He submitted his Petition for Declaration of Veteran Status to the Adjutant General of the United States Army during November of 1972 and sought a declaration recognizing his tenure of service in Nice as an enlistee, supplementing his petition with enclosures consisting of affidavits executed by former officers of the U.S. Army Air Force who served with him in the 81st Airdrome Squadron and who remember having served with him in particular, stating moreover that they were under the definite impression that he was an enlisted member of the U.S. Army Air Force between June of 1945 and February, March or April of 1946. A true and correct copy of his petition, including the affidavits, pictures depicting him wearing standard GI issue uniforms, and a copy of a pass issued to petitioner during his tenure in Nice by the Assistant Adjutant for the 81st Airdrome Squadron, which reflects Vojeslav Medenica (petitioner's name prior to July of 1957 when he officially changed his name to Walter Vojeslav Medenica as part of his U.S. naturalization procedure) and states that he, as a "soldier", will be governed by rules and regulations set up by military police, was attached as Exhibit "A" to petitioner's original complaint filed with the District Court. Affiant Aby A. Francisco, retired from the U.S. Armed Forces as a Lieutenant Colonel, is presently an in-

structor at North Michigan University in Marquette, Michigan. Affiant Bernard Byford is presently the owner of Byford Motors in McGregor, Texas. Affiant Broughton Van Veen is presently the owner of Van Veen and Company, manufacturers' representatives in Chicago, Illinois. Another affidavit attached to the petition to the Adjutant General, executed by G. Comlenac, presently the assistant to the president of International Chemical and Nuclear Corporation, states that affiant was an officer in the Royal Yugoslavian Army stationed in France during 1945, became associated with petitioner, and that to the best of his knowledge petitioner served as a soldier in the U.S. Army Air Force who at all times represented himself to be a member thereof. The Chief of the Army Reference Branch of the National Personnel Records Center in St. Louis, Missouri, responded to the petition during December of 1972 and states that the Army was unable to identify a record of petitioner's service with the U.S. Army Air Force.

Petitioner filed an action in the U.S. District Court for the Northern District of Alabama against the Secretary of the U.S. Army for judicial review of the decision of the Army Reference Branch, and the same was dismissed without prejudice on June 11, 1973 to the right of petitioner to pursue available administrative remedies.

Petitioner filed his petition with the Army Board for the Correction of Military Records (Exhibit "A" to his original complaint filed with the District Court) and the Executive Secretaries of the Army and Air Force Boards decided that jurisdiction rests with the Air Force Board for the Correction of Military Records. The Air Force Board for the Correction of

Military Records responded on November 19, 1973 and denied relief by stating that a careful consideration of his military record, together with such facts as have been presented by him, fails to establish a showing of probable error of injustice in petitioner's case pursuant to Section 1552(a) of Title 10 of the U.S. Code, which provides for the correction of military records when considered necessary to correct an error or remove an injustice.

Petitioner's original complaint filed on December 6, 1973, seeks to invoke the Court's jurisdiction pursuant to the provisions of Section 702 et seq. of Title 5 of the U.S. Code, and on March 22, 1974 the District Court filed its Order granting defendants' motion for summary judgment and dismissing the case with prejudice. The Court of Appeals affirmed per curiam on August 27, 1974.

REASON FOR GRANTING THE WRIT

I. The Court below has decided an important question of federal law which has not been, but should be, settled by this Court because it deprives petitioner of rights to obtain veterans preference status with his federal employing agency in denying him the equal application of Section 3254 of 10 U.S. Code by failing to recognize his temporary enlistment with the United States Army Air Corps in time of emergency immediately subsequent to World War II.

The District Court, affirmed per curiam on appeal, concluded that petitioner failed to show any evidence of arbitrariness and capriciousness on the part of the Air Force Board for the Correction of Military Records and that petitioner presented insufficient evidence to support an enlistment under Section 3254 of 10 U.S. Code. In support of its conclusion, the Court cites *Denton* v. *Samons,* 315 F. Supp. 279 (N.D. Cal. 1970), aff'd 483 F.2d 21 (9th Cir. 1973), which held

that judicial relief is not available absent a showing that the action of the Board for the Correction of Military Records was unsupported by substantial evidence.

The broader question is whether or not governmental standards are too rigid and inflexible to allow relief when justice demands the same, and *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), clothes the district court with authority to engage in a substantial inquiry as to the reasons for the Board's failure to consider petitioner's evidence or even rationalize its existence, notwithstanding the fact that the government is unable to identify his record of service. The district court failed to analogize *Volpe* to the petitioner's case, and the one and only inference to be drawn is that petitioner did not prevail because he failed to produce one indispensable document—a discharge, a copy of which the government does not have in its possession.

Petitioner has alleged that he was accepted as an enlistee, but respondents have refused to acknowledge his prior enlistment status only on the basis of his inability to produce a discharge. A discharge is not important, nor conclusive, in resolving the question whether or not petitioner did enlist and whether or not he was eligible to enlist. This Court ruled in *United States* v. *Grimley,* 173 U.S. 147 (1890), and reiterated in *United States* v. *Union P. R. Co.,* 249 U.S. 354 (1918), that the taking of the oath of allegiance is the pivotal fact which changes the status of a recruit from that of civilian to that of soldier, and *Ex parte Beaver* (D.C. Ohio) 271 F. 493 (1921), decided that the United States alone may plead the disability of an enlistee, and that when he enlists he can not escape the liability thus incurred. Petitioner

has made the unrefuted statement, supported by affidavits of his former officers, that he did enlist, and since an indispensable incident to enlistment is the taking of the oath of allegiance, the only conclusion is that he served as a member of the Armed Forces pursuant to the provisions of Section 3254 (1) of 10 U.S. Code, which provide for temporary enlistment in the Army during time of emergency declared by Congress. The remaining, definitive issue, therefore, is why the government is not willing to favor petitioner's evidence with credibility.

The Board's adverse decision may be premised on concealed considerations. The ludicrous notion that a present admission of petitioner's prior enlistment may result in a dilemma for the government, which may be prohibited from rendering a retroactive discharge, because the same would then be concomitant with all retroactive benefits, is being waived in favor of the more substantial presumption that the government must now disclaim his prior enlistment lest it justify it at the expense of embarrasing this Country for having allowed General George Patton, Jr., to ponder the possibility of breaching our agreement at Potsdam. It is inconceivable that four former military officers, three having served with the United States Army Air Force and one with the Royal Yugoslavian Army, would lie in their affidavits in order to promote petitioner's endeavor. The affidavits speak for themselves and the government refuses to recognize them because of a prior "bureaucratic military bungle" in failing to provide petitioner with the proper discharge papers when it terminated operations in Nice. The inquiry logically addresses itself to the reason for accepting petitioner, as well as others

like him, for service in Nice shortly *after* the end of World War II, and the answer may be gleaned from excerpts in encyclopedias and books which depict historical reviews of General Patton and his vociferous aim to go to war against Russia shortly after the end of the war when he was Military Governor of Bavaria, Germany. See 21 Encyc. Am. (1970). In SEMMES: PORTRAIT OF PATTON 283 (1955); Appleton-Century-Crofts, Inc., General Harry H. Semmes describes his impression of General Patton's far-sighted analysis of our approaching difficulty with Russia back in 1945, "when so few people saw the danger". FARAGO: PATTON, ORDEAL AND TRIUMPH, 807-9 (1963); I. Obolensky, Inc., corroborates AYER: BEFORE THE COLORS FADE, PORTRAIT OF A SOLDIER, GEORGE S. PATTON, JR., 230-3 (1964); Norman S. Berg, in which Fred Ayer, Jr., relates General Patton's conversations with his superiors immediately after World War II when he endeavored to combine the allied forces with the Czech, Austrian, Hungarian and even German forces against the Russians. As Third Army Commander, Patton intended to go to war against Russia and our Armed Forces considered that possibility which was not abandoned until after he died in December of 1945.

To merit favorable treatment petitioner is required to present sufficient evidence to support an enlistment under Section 3254 notwithstanding the requirement that the government is to maintain records of enlistments and discharges of former members of the Armed Forces. If any of the millions of discharged Americans, having lost his discharge papers, was to be advised that there are no records indicating a prior enlistment and subsequent discharge, quite naturally,

he would assemble and produce documentation to support his claim, which the government would reject when it is unable to identify his record of service. His one and only recourse would be to present his grievance to the courts and seek judicial review, and the courts would abandon their responsibility to the individual and cooperate with the government in shearing him of his earned rights and privileges when "rubber stamping" administrative decisions which are arbitrary and capricious because they are premised on the ostensible policy that recourse will summarily be denied when government records are lost or destroyed.

CONCLUSION

For the foregoing reason the petition for writ of certiorari should be granted.

Respectfully submitted,

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